

REMARKS

Claims 14-20 have been withdrawn. Claims 1-13 are pending.

RESTRICTION REQUIREMENT

Applicants affirmed the provisional election of Group I, claims 1-13 on October 17, 2006.

CLAIM REJECTIONS

Rejection under 35 U.S.C. § 102(e)

The Examiner has rejected claims 1-6 and 8-13 under 35 U.S.C. §102(e) as being unpatentable over U.S. Patent No. 7,014,878 to Tangprasertchai et al. ("Tangprasertchai"). See Office Action at p. 3. Claims 2-6 and 8-13 depend from independent claim 1.

Applicants have discovered a non-yeast leavened fine bakery product with increased shelf life that includes an intermediate or high moisture baked product having a water activity $a_w > 0.8$, the surface of the bakery product having deposited thereon an effective amount of natamycin which is sufficient to keep the product mould free when packaged for a storage time of 2 weeks or more at ambient temperature. See claim 1.

Tangprasertchai describes "[a] fully baked bread product is provided which can be stored for extended periods of time and which retains its desirable soft texture for the shelf life (e.g., at least about 3 months) of the product if maintained under a modified atmosphere (i.e., low oxygen and preferably inert gas) at refrigerated conditions (i.e., about 35 to about 45° F.)." (emphasis added). See Abstract. Tangprasertchai further describes that a "fully cooked bread bowl product which can be stored under refrigerated conditions and which retains excellent organoleptic properties (e.g., soft interior texture and firm crust) through its entire shelf life of at least about three months, and preferably about four months or longer." See col. 1, lines 7-13. The bread is prepared with dough including flour, salt, microbial inhibitor, gluten, leavening agent, enzyme, fructose corn syrup, shortening, monoglycerides and diglycerides and water. See col. 6, lines 17-25.

Tangprasertchai does not describe a non-yeast leavened fine bakery product with increased shelf life that includes an intermediate or high moisture baked product having a water activity $a_w > 0.8$. See claim 1. Contrary to the Examiner's assertions, Tangprasertchai does not describe fine bakery product with increased shelf life, such as intermediate or high moisture baked product such as muffins, tortillas, waffles, sponge cakes and the like having a water activity $a_w > 0.8$. See p. 3, lines 3-9 of the specification.

The Examiner, however, contends that "the application of natamycin in Tangprasertchai would inherently be in an amount sufficient for mold free storage for two weeks at ambient temperature." See Office Action at p. 4. The Examiner further alleges that Tangprasertchai "is considered to inherently meet the amount of natamycin to achieve the recited storage time and temperature for reasons given above." *Id.* The MPEP states that the "Examiner must provide rationale or evidence tending to show inherency." See MPEP 2112 (IV). Specifically, "[i]n relying upon the theory of inherency, the examiner must provide a basis in fact and/or technical reasoning to reasonably support the determination that the allegedly inherent characteristic necessarily flows from the teachings of the applied prior art." *Ex parte Levy*, 17 USPQ2d 1461, 1464 (Bd. Pat. App. & Inter. 1990) (emphasis in original)." *Id.* The Examiner has not done so here. Tangprasertchai does not describe that the surface of a bakery product has deposited thereon an effective amount of natamycin which is sufficient to keep the product mould free when packaged for a storage time of 2 weeks or more at ambient temperature. See claim 1. Further, Tangprasertchai only describes bread products which are stored *under refrigerated conditions* (see Abstract) in contrast to ambient storage temperatures of the non-yeast leavened fine bakery products of claim 1. Tangprasertchai does not describe the fine bakery product of claim 1.

Accordingly, independent claim 1 is not anticipated by Tangprasertchai. Claims 2-6 and 8-13 depend from claim 1 and are also not anticipated by Tangprasertchai for at least the reasons described above. Applicants respectfully request reconsideration and withdrawal of this rejection.

Rejection under 35 U.S.C. § 103(a)

The Examiner has rejected claims 1-13 “under 35 U.S.C. § 103(a) (based on 102(e))” as being unpatentable over Tangprasertchai, further in view of U.S. Patent No. 3,996,386 to Malkki (“Malkki”), applicants’ admission of the prior art¹, U.S. Patent No. 3,753,734 to Kaplow et al. (“Kaplow”), U.S. Patent No. 3,655,404 to Glasser et al. (“Glasser”), U.S. Patent No. 3,021,219 to Melnick (“Melnick”), U.S. Patent No. 6,210,723 to Coleman et al. (“Coleman”), U.S. Patent No. 5,409,717 to Apicella et al. (“Apicella”), U.S. Patent No. 5,225,222 to Cha et al. (“Cha”), and the Johnson et al., Encyclopedia of Food Technology (1974) (“Johnson”). See Office Action at p. 4-6. Claims 2-13 depend from independent claim 1.

The Examiner states that “although it is not the intent of Tangprasertchai et al to store the product for only two weeks at ambient temperature, Tangprasertchai et al is being construed to provide an effective amount of natamycin which would be inherently sufficient to keep the product mold free when packaged for a storage time of two weeks at ambient temperature.” See Office Action at p. 5. The Examiner further alleges that “the art is replete with teachings of providing baked products, as well as other food products, with a coating of natamycin, as well as other conventional antimicrobial compounds, such that the treated food is given a longer shelf life.” *Id.*

As previously explained, Tangprasertchai does not teach or suggest a non-yeast leavened fine bakery product with increased shelf life that includes an intermediate or high moisture baked product having a water activity $a_w > 0.8$, the surface of the bakery product having deposited thereon an effective amount of natamycin which is sufficient to keep the product mould free when packaged for a storage time of 2 weeks or more at ambient temperature. See claim 1.

¹ Applicants wish to clarify the phrase “applicants’ admission of the prior art” that has been referred to by the Examiner throughout this Office Action. See Office Action at p. 4 and 5. MPEP 2129 states that “[a] statement by an applicant during prosecution identifying the work of another as ‘prior art’ is an admission that that work is available as prior art against the claims, regardless of whether the admitted prior art would otherwise qualify as prior art under the statutory categories of 35 U.S.C. 102. *Riverwood Int’l Corp. v. R.A. Jones & Co.*, 324 F.3d 1346, 1354, 66 USPQ2d 1331, 1337 (Fed Cir. 2003).” Applicants have not done so within the specification. The paragraph where the Examiner has cited as being an admission of prior art (see p. 4 of the Office Action) is merely background information. The Background section of the application is intended to describe the field of the art and the problems involved. None of the references cited in the specification should be considered an admission of prior art by the Applicants.

Malkki describes a “method for preventing moulding or other microbial surface deterioration of foods and feeds due to micro-organisms by using a preservative substance, either a chemically defined food additive or a vegetable extract having microbicidal or microbe-inhibiting effect.” See Abstract. Malkki describes a process for applying preservatives onto the surface of half-dry food articles such as bread, cheese, fish and sausages. See col. 1, lines 12-14 and col. 3, lines 32-41 of Malkki. Malkki does not teach or suggest a non-yeast leavened fine bakery product with increased shelf life that includes an intermediate or high moisture baked product having a water activity $a_w > 0.8$, the surface of the bakery product having deposited thereon an effective amount of natamycin which is sufficient to keep the product mould free when packaged for a storage time of 2 weeks or more at ambient temperature. See claim 1.

Kaplow describes “pancake and waffle products which are shelf stable against microorganic decomposition, to the extent that the necessity of further treatments to provide bacteriostasis and protection against development of molds is avoided.” See col. 1, lines 7-11. Kaplow further describes that “as a precautionary measure against the growth of yeast and molds certain antimycotic agents are incorporated in the batter at sufficient levels to prevent the growth of such organisms.” See col. 3, lines 2-5 of Kaplow. Kaplow does not teach or suggest a non-yeast leavened fine bakery product with increased shelf life that includes an intermediate or high moisture baked product having a water activity $a_w > 0.8$, the surface of the bakery product having deposited thereon an effective amount of natamycin which is sufficient to keep the product mould free when packaged for a storage time of 2 weeks or more at ambient temperature. See claim 1.

Glasser describes “French toast which is shelf stable against microorganic decomposition to the extent that the necessity of further treatments to provide bacteriostasis and protection against development of molds is avoided.” See col. 1, lines 3-6 of Glasser. Glasser further describes “emulsions containing low cost, high quality shelf stable syrup, which produces a maple-like aroma and a maple taste when grilled on bread to make French toast.” See col. 1, lines 12-15 of Glasser. Glasser also describes that “as a precautionary measure against the growth of yeast and molds certain antimycotic agents are incorporated in the emulsion at sufficient levels to prevent the growth of such organisms.” See col. 2, lines 45-59 of Glasser. Glasser does not teach or suggest a non-yeast leavened fine bakery product with increased shelf

life that includes an intermediate or high moisture baked product having a water activity $a_w > 0.8$, the surface of the bakery product having deposited thereon an effective amount of natamycin which is sufficient to keep the product mould free when packaged for a storage time of 2 weeks or more at ambient temperature. See claim 1.

Melnick describes a method for preventing mold spoilage of a baked product by spraying or painting the product with a sorbic acid solution to protect the surface when the baked product is removed from the oven. See col. 2, lines 14-17 of Melnick. Melnick does not teach or suggest a non-yeast leavened fine bakery product with increased shelf life that includes an intermediate or high moisture baked product having a water activity $a_w > 0.8$, the surface of the bakery product having deposited thereon an effective amount of natamycin which is sufficient to keep the product mould free when packaged for a storage time of 2 weeks or more at ambient temperature. See claim 1.

Coleman describes "pre-baked product which is intended to be distributed in a refrigerated and/or frozen state and reheated by the consumer" See col. 1, lines 10-12 of Coleman. Coleman further describes that "[b]efore packaging the produc[t] may be sprayed with a preservative, such as an aqueous solution of potassium sorbate." See col. 1, line 67 to col. 2, line 2 of Coleman. Coleman does not teach or suggest a non-yeast leavened fine bakery product with increased shelf life that includes an intermediate or high moisture baked product having a water activity $a_w > 0.8$, the surface of the bakery product having deposited thereon an effective amount of natamycin which is sufficient to keep the product mould free when packaged for a storage time of 2 weeks or more at ambient temperature. See claim 1.

Apicella describes "bagels with extended shelf life" See Abstract. Apicella further describes that "[i]t is also preferred to spray the bagel with a solution of a preservative, such as potassium sorbate, following baking." See col. 3, lines 14-16 of Apicella. Apicella does not teach or suggest a non-yeast leavened fine bakery product with increased shelf life that includes an intermediate or high moisture baked product having a water activity $a_w > 0.8$, the surface of the bakery product having deposited thereon an effective amount of natamycin which is sufficient to keep the product mould free when packaged for a storage time of 2 weeks or more at ambient temperature. See claim 1.

Cha describes "a gellable coating composition for use on microbiologically-sensitive surfaces (i.e., surfaces which exhibit a water activity of 0.9 or more) of foodstuffs, such as fruit pies, cheese cakes, gelatin gels." See col. 1, lines 59-63 of Cha. Cha further describes that "[p]otassium sorbate is the preferred preservative." See col. 2, lines 51-54 of Cha. Cha does not teach or suggest a non-yeast leavened fine bakery product with increased shelf life that includes an intermediate or high moisture baked product having a water activity $a_w > 0.8$, the surface of the bakery product having deposited thereon an effective amount of natamycin which is sufficient to keep the product mould free when packaged for a storage time of 2 weeks or more at ambient temperature. See claim 1.

Johnson is a review on applications of pimaricin (also known as natamycin) on various food products such as cheese, beverages, fruit, soft fruit, other foods. See p. 35-37 of Johnson. Johnson does not teach or suggest a non-yeast leavened fine bakery product with increased shelf life that includes an intermediate or high moisture baked product having a water activity $a_w > 0.8$, the surface of the bakery product having deposited thereon an effective amount of natamycin which is sufficient to keep the product mould free when packaged for a storage time of 2 weeks or more at ambient temperature. See claim 1.

Moreover, even if all the elements of a claim are taught by a combination of references, (which Applicants do not concede to be the case here), there is no *prima facie* case of obviousness in the absence of motivation to combine the references. MPEP 2143.01, citing *In re Rouffet*, 194 F.3d 1350, 1357, 47 USPQ2d 1453, 1457-58 (Fed. Cir. 1998).

None of the above-cited 9 references, alone or in combination, teach or suggest non-yeast leavened fine bakery product with increased shelf life that includes an intermediate or high moisture baked product having a water activity $a_w > 0.8$, the surface of the bakery product having deposited thereon an effective amount of natamycin which is sufficient to keep the product mould free when packaged for a storage time of 2 weeks or more at ambient temperature. In addition, a *prima facie* case of obviousness has not been presented for any of claims 2-13 that depend from claim 1.

Accordingly, claim 1 and claims that depend therefrom are patentable over the above-cited 9 references. Applicants respectfully request the withdrawal of the rejection.

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CONCLUSION

For the foregoing reasons, Applicants respectfully request reconsideration and withdrawal of the pending rejections. Applicants believe that the claims now pending are in condition for allowance. Should any further fees be required by the present Amendment, the Commissioner is hereby authorized to charge Deposit Account **19-4293**.

Respectfully submitted,

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Harold H. Fox
Reg. No. 41,498

Customer No. 27890
Steptoe & Johnson LLP
1330 Connecticut Avenue, NW
Washington, DC 20036-1795
Phone: 202-429-6748
Fax: 202-429-3902